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Majlis Amanah Rakyat (MARA) v Dato' Abd Rahim bin Abd Halim & Ors

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-225–04 OF 2018
WONG CHEE LIN JC
12 JULY 2018

C *Companies and Corporations — Articles of association — Shares — Shareholding requirement – Whether requisition notice issued by plaintiff fulfilled shareholding requirement — Whether rejection of requisition notice a breach of duties by directors — Companies Act 2016 s 311*

D *Companies and Corporations — Directors — Appointment — Appointment of additional directors – Whether appointment of additional directors in good faith and proper purpose — Whether appointment of additional directors valid — Companies Act 2016 ss 202(2) & 211*

E The originating summons ('OS') was filed by the plaintiff, Majlis Amanah Rakyat ('MARA'). There was also a counterclaim filed by the seventh defendant, Med-Bumikar Mara Sdn Bhd ('Med-Bumikar'). Med-Bumikar was a private company that held ordinary shares equivalent to 49.5% interest in
F MBM Resources Bhd ('MBMR'). Med-Bumikar's wholly owned subsidiary company, Central Shore Sdn Bhd, held shares equivalent to 0.57% interest in MBMR. On 7 March 2018, UMW Holding Bhd issued an offer letter to Med-Bumikar to purchase Med-Bumikar's 49.5% stake in MBMR, for a purchase consideration of RM2.56 per share ('UMW offer'). The board of
G directors ('BOD') of Med-Bumikar held a board meeting on 8 March 2018 to consider the UMW offer. The BOD resolved to appoint an independent financial advisor to advise the board on the UMW offer. On 12 March 2018, MARA issued a requisition notice to Med-Bumikar's BOD to convene an extraordinary general meeting ('EGM') for the purpose of passing two
H ordinary resolutions, which were: (a) to accept the UMW offer at a purchase consideration of RM2.56 per share ('resolution 1'); and (b) to appoint Muhamad Zaki bin Jali and Wong Fay Lee to Med-Bumikar's BOD ('resolution 2'). Another BOD meeting was held on 26 March 2018 where the appointed independent financial advisor, RHB Investment Bank Bhd ('RHB')
I was of the view that the purchase consideration of the UMW offer of RM2.56 per share was fair but not reasonable. RHB did not advise that the UMW offer should be rejected and it made no recommendation as to acceptance or rejection. It was resolved by majority of directors, the first to fourth defendants, during the same meeting to decline the UMW offer and to reject MARA's

requisition notice. Soon after, the company secretary of Med-Bumikar circulated a directors' circular resolution ('DCR') to appoint the fifth and sixth defendants to Med-Bumikar's BOD. The DCR was signed by the first to fourth defendants on or before 9 April 2018, prior to the circulation of the DCR to other directors on the board. The eighth defendant received the signed DCR on 11 April 2018 while MARA received the signed DCR on 12 April 2018. Subsequent to the rejection of its requisition notice by the board, MARA issued the notice of EGM on 12 April 2018 to convene an EGM on 30 April 2018 to table resolution 1 and resolution 2 ('EGM notice'). MARA convened an EGM pursuant to the EGM notice and passed the resolutions. The relief sought by MARA in the OS, inter alia, were: (i) a declaration that the appointment of the fifth and sixth defendant as directors for the seventh defendant was null and void; (ii) a declaration that the DCR dated 9 April 2018 which appointed the fifth and sixth defendants as additional directors of the seventh defendant was null and void; (iii) a declaration that all BOD meetings attended by the fifth and sixth defendants and all resolutions passed by the votes and/or involvement of the fifth and sixth defendants were null and void; (iv) a copy of the order was presented to the Companies Commission of Malaysia ('CCM') in order to record the annulment of the appointment of the fifth and sixth defendants as the directors of the seventh defendant; (v) the first to fourth defendants be ordered to present to the CCM a notice to amend the register to directors within 14 days from date of this order; and (vi) the Registrar of Companies and/or CCM was ordered to update the register of directors by cancelling the names Mohd Ridzuan bin Abdul Halim and Sharifuddin bin Shoib. The relief sought by Med-Bumikar in the counterclaim, inter alia, were: (1) a declaration that pursuant to s 211 of the Companies Act 2016 ('the CA') and art 118 of Med-Bumikar's Articles of Association ('AA'), the management and control of the business and affairs of Med-Bumikar lay within the exclusive purview of its BOD and therefore the said board had unfettered discretion to reject the UMW offer; (2) a declaration that the fifth and sixth defendants were validly appointed to the BOD of Med-Bumikar; and (3) a declaration that the two resolutions passed at the EGM on 30 April 2018 were null and void and/or ultra vires s 211 of the CA and/or the AA.

Held, allowing the originating summons and dismissing the counterclaim:

(1) The wording of article 137 merely said that the DCR had to be signed by a majority of the directors of the company and did not stipulate that one of them must be the MARA representative. Section 201 did not require the execution of a statutory declaration, only of a declaration and the declaration that was signed by the fifth and sixth defendants was undated. The reference to a statutory declaration was merely a typographical error as the predecessor to s 201 required the execution of a statutory declaration but only a declaration was required in s 201 of the CA. The fact that the declaration signed by the fifth and sixth defendants was not

dated did not affect the validity of their appointment as directors, only the date of their appointment coming into effect because it was not in dispute that they had signed the undated declaration (see paras 20–21).

(2) MARA fulfilled the shareholding requirement under the AA and s 311 of the CA. The rejection of the requisition notice was a breach by the first to fourth defendants of their duties under the articles and s 311 of the CA. It was obvious that the real or predominant reason the first to fourth defendants appointed the fifth and sixth defendants as additional directors was to prevent MARA from appointing two additional directors at the EGM. The first to fourth defendants had not shown why there was a need to appoint two additional directors at that juncture and why the appointment could not have been tabled at a physical directors' meeting. It was obviously done by way of DCR in order to get around the requirement for a representative of MARA to be present to constitute a quorum at a directors' meeting (see paras 37 & 42).

(3) There was nothing stated in s 202(2) of the CA to limit the appointment of directors by the general meeting by ordinary resolution. The directors of Med-Bumikar did not act in good faith and for a proper purpose in appointing the fifth and sixth defendants as additional directors of the company (see paras 47 & 49).

(4) The first defendant's averment that the DCR that had been purportedly ratified at a purported BOD meeting on 25 April 2018 was ill-conceived. The BOD meeting was not properly constituted as there was a lack of quorum due to the absence of MARA's representative director. Any resolutions purportedly passed during this improperly constituted meeting were invalid. The first defendant's contention that MARA's representative need not be present to form a quorum if there were more than three directors present was not a proper construction of art 129 (see paras 50 & 52).

(5) There was no valid ratification of the DCR. The fact that the first to fourth defendants had seen fit to convene a directors' meeting to ratify the DCR was the recognition on their part that the DCR was defective. Any such ratification would not cure the lack of good faith and proper purpose on the part of the directors in appointing the fifth and sixth defendants. Since the appointment of the fifth and sixth defendants as additional directors had not been made in good faith and for proper purpose, the appointment was invalid (see paras 54–55).

(6) Since the right to make recommendations was not provided for in the AA and the resolution was not a special resolution, the recommendation of the shareholders would not be binding on the board but the board must still consider it and act in the best interest of the company. It was not correct to say that the directors had an unfettered discretion to reject the

UMW offer. Since the appointment of the fifth and the sixth defendants was invalid, an order in terms of the remaining prayers in the counterclaim was unable to be granted. Resolution 1 was valid only insofar as it was a recommendation to the board and not a directive to the board (see paras 62–64).

[Bahasa Malaysia summary

Saman pemula ('OS') telah difailkan oleh plaintif, Majlis Amanah Rakyat ('MARA'). Terdapat juga tuntutan balas yang difailkan oleh defendan ketujuh, Med-Bumikar Mara Sdn Bhd ('Med-Bumikar'). Med-Bumikar adalah syarikat swasta yang memgang saham biasa bersamaan 49.5% faedah dalam MBM Resources Bhd ('MBMR'). Syarikat subsidiari milik penuh Med-Bumikar, Central Shore Sdn Bhd, memiliki saham bersamaan dengan 0.57% faedah dalam MBMR. Pada 7 Mac 2018, UMW Holding Bhd mengeluarkan surat tawaran kepada Med-Bumikar untuk membeli 49.5% saham Med-Bumikar dalam MBMR, untuk pertimbangan pembelian sebanyak RM2.56 sesaham ('tawaran UMW'). Lembaga Pengarah ('BOD') Med-Bumikar mengadakan mesyuarat lembaga pada 8 Mac 2018 untuk mempertimbangkan tawaran UMW. BOD memutuskan untuk melantik penasihat kewangan bebas untuk menasihati lembaga tentang tawaran UMW. Pada 12 Mac 2018, MARA mengeluarkan notis pengambilan kepada BOD Med-Bumikar untuk mengadakan mesyuarat agung luar biasa ('EGM') untuk tujuan meluluskan dua resolusi biasa iaitu: (a) untuk menerima tawaran UMW pada pertimbangan pembelian RM2.56 sesaham ('resolusi 1'); dan (b) melantik Muhamad Zaki bin Jali dan Wong Fay Lee kepada BOD Med-Bumikar ('resolusi 2'). Satu lagi mesyuarat BOD telah diadakan pada 26 Mac 2018 di mana penasihat kewangan bebas yang dilantik, RHB Investment Bank Bhd ('RHB') berpendapat bahawa pertimbangan pembelian tawaran UMW sebanyak RM2.56 sesaham adalah adil tetapi tidak munasabah. RHB tidak menasihati bahawa tawaran UMW harus ditolak dan ia tidak membuat cadangan mengenai penerimaan atau penolakan. Ia telah diselesaikan oleh majoriti pengarah, defendan pertama hingga keempat, dalam mesyuarat yang sama untuk menolak tawaran UMW dan menolak notis pengambilan MARA. Tidak lama kemudian, setiausaha syarikat Med-Bumikar mengedarkan resolusi pekeliling pengarah ('DCR') untuk melantik defendan kelima dan keenam kepada BOD Med-Bumikar. DCR ditandatangani oleh defendan pertama hingga keempat pada atau sebelum 9 April 2018, sebelum peredaran DCR kepada pengarah lain dalam lembaga. Defendan kelapan menerima DCR yang ditandatangani pada 11 April 2018 sementara MARA menerima DCR yang ditandatangani pada 12 April 2018. Berikutan penolakan notis pengambilannya oleh lembaga, MARA mengeluarkan notis EGM pada 12 April 2018 untuk mengadakan EGM pada 30 April 2018 untuk mendaftar resolusi 1 dan resolusi 2 ('notis EGM'). MARA mengadakan EGM menurut notis EGM dan meluluskan resolusi-resolusi tersebut. Relif yang diminta oleh MARA dalam OS, antara lain, adalah: (i) suatu pengisytiharan bahawa

pelantikan defendan kelima dan keenam sebagai pengarah bagi defendan ketujuh adalah batal dan tidak sah; (ii) perisytiharan bahawa DCR bertarikh 9 April 2018 yang melantik defendan kelima dan keenam sebagai pengarah tambahan defendan ketujuh adalah batal dan tidak sah; (iii) perisytiharan bahawa semua mesyuarat BOD yang dihadiri oleh defendan kelima dan keenam dan semua resolusi yang diluluskan oleh undi dan/atau penglibatan defendan kelima dan keenam adalah batal dan tidak sah; (iv) satu salinan perintah dikemukakan kepada Suruhanjaya Syarikat Malaysia ('SSM') untuk merekodkan pembatalan pelantikan defendan kelima dan keenam sebagai pengarah defendan ketujuh; (v) defendan pertama hingga keempat diperintahkan untuk mengemukakan notis kepada SSM untuk meminda daftar kepada pengarah dalam tempoh 14 hari dari tarikh perintah ini; dan (vi) Pendaftar Syarikat dan/atau SSM diperintahkan untuk mengemas kini daftar pengarah dengan membatalkan nama Mohd Ridzuan bin Abdul Halim dan Sharifuddin bin Shoib. Relif yang diminta oleh Med-Bumikar dalam tuntutan balas, antara lain, adalah: (1) perisytiharan yang menurut s 211 Akta Syarikat 2016 ('AS') dan perkara 118 Artikel Persatuan Med-Bumikar ('AA'), pengurusan dan kawalan perniagaan dan urusan Med-Bumikar terletak di dalam bidang eksklusif BOD dan oleh itu lembaga tersebut mempunyai budi bicara bebas untuk menolak tawaran UMW; (2) perisytiharan bahawa defendan kelima dan keenam telah dilantik dengan sah untuk BOD Med-Bumikar; dan (3) perisytiharan bahawa kedua-dua resolusi yang diluluskan di EGM pada 30 April 2018 adalah batal dan tidak sah dan/atau ultra vires s 211 CA dan/atau AA.

Diputuskan, membenarkan saman pemula dan menolak tuntutan balas:

(1) Susunan kata perkara 137 hanya menyatakan bahawa DCR perlu ditandatangani oleh majoriti pengarah syarikat dan tidak menetapkan bahawa salah seorang daripada mereka mestilah wakil MARA. Seksyen 201 tidak memerlukan pelaksanaan akuan berkanun, hanya akuan dan akuan yang ditandatangani oleh defendan kelima dan keenam tidak bertarikh. Rujukan kepada akuan berkanun hanyalah kesalahan tipografi memandangkan yang terdahulu kepada s 201 memerlukan pelaksanaan akuan berkanun tetapi hanya akuan yang diperlukan di dalam s 201 AS. Hakikat bahawa akuan yang ditandatangani oleh defendan kelima dan keenam tidak bertarikh tidak menjejaskan kesahan pelantikan mereka sebagai pengarah, hanya tarikh pelantikan mereka berkuat kuasa kerana tidak ada pertikaian bahawa mereka telah menandatangani perisytiharan yang tidak bertarikh (lihat perenggan 20–21).

(2) MARA memenuhi syarat pemegangan saham di bawah AA dan s 311 AS. Penolakan notis pengambilan itu adalah pelanggaran tugas di bawah perkara dan s 311 AS oleh defendan pertama hingga keempat. Adalah jelas bahawa sebab sebenar atau utama defendan pertama hingga

keempat melantik defendan kelima dan keenam sebagai pengarah tambahan adalah untuk mengelakkan MARA daripada melantik dua pengarah tambahan di EGM. Defendan pertama hingga keempat tidak menunjukkan mengapa ada keperluan untuk melantik dua pengarah tambahan pada masa itu dan mengapa pelantikan itu tidak boleh dibentangkan pada mesyuarat pengarah fizikal. Ia jelas dilakukan dengan cara DCR untuk mendapatkan keperluan untuk seorang wakil MARA hadir untuk membentuk kuorum pada mesyuarat pengarah (lihat perenggan 37 & 42).

(3) Tiada apa-apa yang dinyatakan dalam s 202(2) AS untuk menghadkan pelantikan pengarah oleh mesyuarat agung oleh resolusi biasa. Pengarah Med-Bumikar tidak bertindak dengan niat baik dan untuk tujuan yang betul dalam melantik defendan kelima dan keenam sebagai pengarah tambahan syarikat (lihat perenggan 47 & 49).

(4) Penegasan defendan pertama bahawa DCR yang dikatakan diluluskan pada mesyuarat BOD pada 25 April 2018 adalah salah anggap. Mesyuarat BOD tidak diadakan dengan betul memandangkan terdapat kekurangan kuorum kerana ketiadaan pengarah wakil MARA. Sebarang resolusi yang dikatakan diluluskan semasa mesyuarat yang tidak wajar ini tidak sah. Pernyataan defendan pertama bahawa wakil MARA tidak perlu hadir untuk membentuk kuorum jika terdapat lebih daripada tiga pengarah yang hadir bukanlah pendirian perkara 129 yang betul (lihat perenggan 50 & 52).

(5) Tidak terdapat kelulusan DCR yang sah. Hakikat bahawa defendan pertama hingga keempat telah dilihat layak untuk mengadakan mesyuarat pengarah untuk mengesahkan DCR adalah pengiktirafan di pihak mereka bahawa DCR adalah cacat. Sebarang pengesahan tidak akan menghilangkan kekurangan niat baik dan tujuan yang sepatutnya oleh pengarah-pengarah dalam melantik defendan kelima dan keenam. Oleh kerana pelantikan defendan kelima dan keenam sebagai pengarah tambahan tidak dibuat dengan niat baik dan tujuan yang sepatutnya, perlantikan tersebut adalah tidak sah (lihat perenggan 54–55).

(6) Oleh kerana hak untuk membuat cadangan tidak disediakan dalam AA dan resolusi tersebut bukan resolusi khas, cadangan pemegang saham tidak akan mengikat lembaga tetapi lembaga masih perlu mempertimbangkannya dan bertindak demi kepentingan terbaik syarikat. Adalah tidak benar untuk menyatakan bahawa pengarah mempunyai budi bicara bebas untuk menolak tawaran UMW. Oleh kerana pelantikan defendan kelima dan keenam tidak sah, perintah bagi permohonan di dalam tuntutan balas tidak dapat diberikan. Resolusi 1 adalah sah sah hanya jika ia merupakan cadangan kepada lembaga dan bukan arahan kepada lembaga (lihat perenggan 62–64).]

Notes

For cases on appointment, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 200–206.

For cases on shares, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 77–78.

Cases referred to

Automatic Self-cleansing Filter Syndicate Company, Limited v Cuninghame [1906] 2 Ch 34, CA (refd)

Charterbridge Corporation Ltd v Lloyds Bank Ltd and Another [1969] 2 All ER 1185, Ch D (refd)

Dato' Hamzah Abdul Majid & Anor (for and on behalf of shareholders and members of Wembley Industries Holdings Bhd other than the defendants) v Wembley Industries Holdings Bhd & Ors [1998] 2 MLJ 211; [1998] 4 CLJ 471, HC (refd)

Eclairs Group Ltd and another v JKX Oil and Gas plc [2016] 3 All ER 641, SC (refd)

Extrasure Travel Insurances Ltd and another v Scattergood and another [2003] 1 BCLC 598, Ch D (refd)

Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] AC 821, PC (refd)

Lim Koei Ing v Pan Asia Shipyard & Engineering Co Pte Ltd [1995] 1 SLR 499; [1995] 1 SLR (R) 15, HC (refd)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)

Regentcrest plc (in liquidation) v Cohen and another [2001] 2 BCLC 80, Ch D (refd)

Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors [1991] 1 MLJ 211, HC (refd)

Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177, FC (refd)

Tsang Wai Lun Wayland & Anor v Chu King Fai & Ors [2009] HKCU 1195 (refd)

Wong Pak Sum v Hong Kong Furniture & Decoration Trade Association Ltd [2013] HKCU 2774 (refd)

Worcester Corsetry, Limited v Witting [1936] Ch 640, CA (refd)

Legislation referred to

Companies Act 2016 ss 195, 201, 202(2), 211, 231(1), 311, 313(1)

Azlan bin Sulaiman (Farah Nadiah bt Zainudin and Yap Chean Hong with him) (Azmi & Assoc) for the plaintiff.

Satish a/l Vasudevan Nair (Satish Alli & Assoc) for the first to seventh defendants.

Christopher Leong Sau Foo (Shamala Devi a/p Balasundaram with him) (Chooi & Company; Cheang & Ariff) for the eight and nineth defendants.

Wong Chee Lin JC:

[1] The originating summons ('OS') herein is filed by the plaintiff Majlis Amanah Rakyat ('MARA'). There is a counterclaim filed by the seventh defendant Med-Bumikar Mara Sdn Bhd ('Med-Bumikar'). I have allowed the OS and substantially dismissed the counterclaim. These are the full reasons for my decision.

INTRODUCTION

[2] The following is the relief sought by MARA in the OS:

(a) a declaration that the appointment of the fifth and sixth defendant as directors for the seventh defendant is null and void;

(b) a declaration that the directors' circular resolution dated 9 April 2018 which appointed the fifth and sixth defendant as additional directors of the seventh defendant is null and void;

(c) a declaration that all board of directors' meetings attended by the fifth and sixth defendant and all resolutions passed by the votes and/or involvement of the fifth and sixth defendant are null and void;

(d) a copy of the order is presented to the Companies Commission of Malaysia in order to record the annulment of the appointment of the fifth and sixth defendant as the directors of the seventh defendant;

(e) first to fourth defendants be ordered to present to the Companies Commission of Malaysia, a notice to amend the register to directors within 14 days from the date of this order;

(f) the Registrar of Companies and/or Companies Commission of Malaysia is ordered to update the register of directors by cancelling the names Dato' Mohd Ridzuan bin Abdul Halim (NRIC No 430422–02–5313) and Encik Sharifuddin bin Shoib (NRIC No 470920–08–6289);

(g) costs; and

(h) any further or other reliefs as this honourable court deems fit and proper.

[3] The following is the relief sought by Med-Bumikar in the counterclaim:

(a) a declaration that pursuant to s 211 of the Companies Act 2016 and article 118 of Med-Bumikar MARA Sdn Bhd's articles of association, the management and control of the business and affairs of Med-Bumikar MARA Sdn Bhd lies within the exclusive purview of its board of directors and therefore the said board has unfettered discretion to reject the offer dated 7 March 2018 by UMW Holdings Bhd;

A (b) a declaration that the fifth and sixth defendants were validly appointed to the board of directors of Med-Bumikar MARA Sdn Bhd;

(c) a declaration that the two resolutions passed at the extraordinary general meeting on 30 April 2018 are null and void and/or ultra vires s 211 of the Companies Act 2016 and/or the articles of association of Med-Bumikar MARA Sdn Bhd;

(d) costs on a solicitor-client basis or on an indemnity basis to be paid forthwith; and

C (e) such further and/or other relief as this honourable court deems fit and proper.

SALIENT BACKGROUND FACTS

D **[4]** Med-Bumikar is a private company which holds 193,504,349 ordinary shares, equivalent to 49.5% interest in MBM Resources Bhd, a public company ('MBMR'). Med-Bumikar's wholly owned subsidiary company, Central Shore Sdn Bhd ('Central Shore'), holds 2,213,402 MBMR shares, equivalent to 0.57% interest in MBMR.

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[5] MBMR, in turn, holds 22.58% interest in Perodua Bhd, a public company ('Perodua').

F **[6]** Med-Bumikar's shareholders and their respective shareholding is as follows:

No	Name of shareholders	Parties/relationship with parties to this action	Shareholding (%)
1	Majlis Amanah Rakyat	Plaintiff/MARA	29.18
2	Prestige Automobiles Services Sdn Bhd	D1 is a director and the majority shareholder	11.74
3	Ng Seng Kong	D2	0.64
4	NGT Holdings Sdn Bhd	D2 is a director and shareholder	3.8
5	Harmony Parade Sdn Bhd	D2 is a director and NGT Holdings Sdn Bhd is a shareholder	6.41
6	Aqil Bin Tan Sri Dato' Dr Hj Ahmad Azizuddin	D3	1.87
7	Azizuddin Sdn Bhd	D3 is a director and shareholder	11.60

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8	Rosen Sdn Bhd	D4 is a director and shareholder	11.75
9	Looi Kok Loon	D8	1.42
10	Wong Wei Khin	D9	1.71
11	KP Looi Holdings Sdn Bhd	D8 is a director and shareholder	10.29
12	LT Wong (Holdings) Sdn Bhd	D9 is a director and shareholder	9.28
13	Wong Fay Ling	—	0.18
14	Turisaina bt Hussin	—	0.13

[7] In early March 2018 and before the relevant events leading to MARA's Originating Summons, the Board of Directors of Med-Bumikar comprised of seven directors and three alternate directors as follows:

No	Name of directors	Parties	Position
1	Dato' Abd Rahim bin Abd Halim	D1	Director
2	Ng Seng Kong	D2	Director
3	Aqil bin Tan Sri Dato' Dr Haji Ahmad Azizuddin	D3	Director
4	Yap Siew Chin	D4	Director
5	Datin Junaidah bt Abdul Majid	Representative director of MARA	Director
6	Looi Kok Loon	D8	Director
7	Wong Wei Khin	D9	Director
8	Muhamad Zaki bin Jali	—	Alternate Director to Datin Junaidah binti Abdul Majid
9	Wong Fay Lee	—	Alternate Director to D9
10	Nazli bt Abd Rahim	—	Alternate Director to D1

[8] On 7 March 2018, UMW Holding Bhd issued an offer letter to Med-Bumikar to purchase Med-Bumikar's 49.5% stake in MBMR, for a purchase consideration of RM2.56 per share ('UMW offer').

[9] The board of directors of Med-Bumikar held a board meeting on 8

March 2018 to, among other things, consider the UMW offer. The board of directors resolved to appoint an independent financial advisor to advise the board of directors on the UMW offer.

[10] On 12 March 2018, MARA issued a requisition notice ('requisition notice') to Med-Bumikar's board of directors to convene an extraordinary general meeting ('EGM') for the purpose of passing two ordinary resolutions, which in brief, are as follows:

(a) ordinary resolution to accept the UMW offer at a purchase consideration of RM2.56 per share ('resolution 1'); and

(b) ordinary resolution to appoint En Muhamad Zaki bin Jali and Ms Wong Fay Lee to Med-Bumikar's board of directors ('resolution 2').

[11] Another board of directors' Meeting was held on 26 March 2018 where the appointed independent financial advisor, RHB Investment Bank Bhd ('RHB') gave its evaluation and opinion on the UMW Offer. Essentially, RHB was of the view that the purchase consideration of the UMW offer of RM2.56 per share was fair but not reasonable. RHB did not advise that the UMW offer should be rejected; it made no recommendation as to acceptance or rejection.

[12] It was resolved by majority of directors, the first to fourth defendants, during the board of directors' meeting on 26 March 2018, to:

(i) decline the UMW offer. It should be noted that it was specifically stated that this did not mean an end to negotiations; and

(ii) reject MARA's requisition notice.

[13] Soon after, the company secretary of Med-Bumikar circulated a directors' circular resolution ('DCR') to appoint the fifth and sixth defendants to Med-Bumikar's board of directors. The DCR was signed by the first to fourth defendants (and therefore passed by majority) on or before 9 April 2018, prior to the circulation of the DCR to other directors on the board. The eighth defendant received the signed DCR on 11 April 2018 while MARA received the signed DCR on 12 April 2018.

[14] Subsequent to the rejection of its requisition notice by the board of directors on 26 March 2018, MARA issued the notice of EGM on 12 April 2018 to convene an EGM on 30 April 2018 to table resolution 1 and resolution 2 ('EGM notice').

[15] On 23 April 2018, a faction of shareholders opposed to the UMW offer ('the opponents' faction') filed an originating summons against MARA, MARA's representative director, the eighth and ninth defendants and

Med-Bumikar alleging, amongst others, that they had been oppressed as minority shareholders of Med-Bumikar ('oppression suit'). An interim injunction was also sought by the opponents' faction to restrain the EGM scheduled on 30 April 2018. The interim injunction application was dismissed by the court on 25 April 2018, paving the way for the EGM to be held on 30 April 2018. The oppression suit itself was eventually discontinued on 15 May 2018.

[16] On 30 April 2018, MARA convened an EGM pursuant to the EGM notice and the shareholders present and voting unanimously passed resolution 1 and resolution 2. Pursuant to resolution 1, it was resolved, inter alia, that approval be given to the company to accept the UMW offer. In addition to the above resolution, the members requested the board to reconsider the offer from UMW and form a board task force committee comprising at least two members from MARA to negotiate with UMWH for better/higher price, acting in the best interest of the company.

[17] Pursuant to resolution 2, En Mohamad Zaki bin Jali and Ms Wong Fay Lee were appointed as directors of the company.

FINDINGS OF THE COURT

[18] The following articles of the articles of association of Medi-Bumikar ('AA') are relevant:

(a) article 68 of AA:

> The Directors shall call an extraordinary General Meeting whenever a requisition in writing signed by members of the Company holding in the aggregate not less than one-tenth in amount of the issued capital of the Company, upon which all calls or other sums then due shall have been paid and stating fully the objects of the meeting shall be deposited at the office of the Company. Such requisition may consist of several documents in like form each signed by one or more of the requisitionists.

(b) article 69 of AA:

> If the Directors do not, within twenty one days from the date of the requisition being so deposited, proceed to convene a meeting, the requisitionists or any of them representing more than one half of the voting rights of all of them may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of such deposit.

(c) article 75 of AA:

> All business transacted at an annual general meeting, other than business which, under these articles ought to be transacted at an annual general

meeting and all business transacted at an extraordinary general meeting, shall be deemed special.

(d) article 103 of AA:

Until otherwise determined by general meeting the number of Directors including the Managing Director shall not be less than six (6) nor more than nine (9), but in the event of any casual vacancy occurring and reducing the number of Directors below the aforesaid minimum the continuing Director may act for the purpose of filing up such vacancy or vacancies or of summoning a general meeting of the company.

(e) article 104 of AA:

The Directors shall have power at any time and from time to time to appoint any other qualified person as Director, either to fill a casual vacancy or as an addition to the Board, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or pursuant to Article 103 but any Director so appointed shall hold office only until the next following annual general meeting of the company, and shall then be eligible for re-election.

(f) article 126 of AA:

The Company may from time to time in General Meeting increase or reduce the number of Directors and determine in what rotation such increased or reduced number shall go out of office.

(g) article 127 of AA:

Any casual vacancy occurring in the Board of Directors may be filled up by the Directors, but any person so chosen shall retain his office only until the next following annual general meeting of the Company, and shall then be eligible for re-election.

(h) article 129 of AA:

The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings and proceedings as they think fit and may from time to time determine the quorum necessary for the transaction of business. Unless otherwise determined, three directors shall form a quorum, if one of them is a MARA director.

(i) article 137 of AA:

A resolution in writing signed by a majority of the directors for the time being present in Malaysia, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. Any such resolution may consist of several documents in like form including facsimile, each signed by one or more directors.

[19] Central to the OS and the defence of the counterclaim is the contention

by MARA and the eight and ninth defendants that, in appointing the fifth and sixth defendants as directors of Med-Bumikar, the first to fourth defendants as directors of Med-Bumikar who signed the DCR did not act in good faith and for a proper purpose.

[20] In addition to that contention, MARA also submitted that in the light of article 129 of the AA and other similar articles, reading the articles as a whole, it should be construed that unless MARA's representative signed the DCR, it is not valid. I cannot agree with that submission of MARA. Whether it is by an inadvertent omission to amend article 137 or whatever, the wording of article 137 merely says that the DCR has to be signed by a majority of the directors of the company and does not stipulate that one of them must be the MARA representative.

[21] MARA also contends that it was resolved in the DCR that the appointment of the fifth and sixth defendants shall be with effect from the date of their date of execution of the Statutory Declaration made pursuant to s 201 of the Companies Act 2016 and there was no such statutory declaration signed. s 201 does not require the execution of a statutory declaration, only of a declaration and the declaration that was signed by the fifth and sixth defendants is undated. I accept the submission of learned counsel for the first to seventh defendants that the reference to a statutory declaration is merely a typographical error as the predecessor to s 201 required the execution of a statutory declaration but only a declaration is required in s 201 of the Companies Act 2016. I also find that the fact that the declaration signed by the fifth and sixth defendants is not dated does not affect the validity of their appointment as directors, only the date of their appointment coming into effect because it is not in dispute that they have signed the undated declaration.

[22] As regards the contention that the appointment of the fifth and sixth defendants was not made by the first to fourth defendants in good faith and for a proper purpose, the proposition that a director of a company shall at all times exercise his powers in accordance with the Companies Act, for a proper purpose and in good faith in the best interest of the company is trite and is set out in s 231(1) of the Companies Act 2016.

[23] In the case of *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] AC 821 at p 835, the Privy Council held that the test to determine whether directors had acted with proper purpose is primarily an objective one, as follows:

> In Their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may

A be exercised, it is then necessary for the court, if a particular exercise of its is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done B this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.

[24] In the case of *Extrasure Travel Insurances Ltd and another v Scattergood and another* [2003] 1 BCLC 598 at p 619 referred to by learned counsel for the C eighth and ninth defendants, the English High Court set out a four stage approach in determining whether directors have acted for a proper purpose as follows:

[92] The law relating to proper purposes is clear, and was not in issue. It is D unnecessary for a claimant to prove that a director was dishonest, or that he knew he was pursuing a collateral purpose. In that sense, the test is an objective one. It was suggested by the parties that the court must apply a three-part test, but it may be more convenient to add a fourth stage. The court must:

92.1 Identify the power whose exercise is in question;

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92.2 Identify the proper purpose for which that power was delegated to the directors;

92.3 Identify the substantial purpose for which the power was in fact exercised; and

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92.4 Decide whether that purpose was proper.

[93] Finally, it is worth noting that the third stage involves a question of fact. It turns on the actual motives of the directors at the time: *Re a company, ex p Glossop* [1988] BCLC 570 at p 577.

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[25] The court also held that directors should not use their powers for the purpose of influencing the outcome of a general meeting. In *Eclairs Group Ltd and another v JKX Oil and Gas plc* [2016] 3 All ER 641 at p 649 the Supreme Court held as follows:

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The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the I question is one of abuse of powers', said Viscount Finlay in *Hindle v John Cotton Ltd* 1919 56 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important.

[16] A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated

as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders.

[26] In *Regentcrest plc (in liquidation) v Cohen and another* [2001] 2 BCLC 80, the court held that the court had to consider whether the director honestly believed that the action taken by him was in the interests of the company. Parker J stated, at p 105, as follows:

[120] The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see *Palmer's Company Law* para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

[27] Both *Regentcrest plc (in liquidation) v Cohen and another* and *Charterbridge Corporation Ltd v Lloyds Bank Ltd and Another* [1969] 2 All ER 1185 were cited with approval by the Federal Court in the recent case of *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177. The Federal Court stated, at p 231, that the test for duty of good faith and in the best interest of the company has both subjective and objective elements:

[166] In our judgment, the correct test combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company ...

[167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts ...

[28] The Court of Appeal in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 considered the duty of directors to act in good faith and for a proper purpose. It was held that if

directors exercised their powers for some ulterior purpose or its exercise were to be carried out in an improper manner, even where it is substantially altruistic, such an exercise of powers could be set aside. The court held at p 657:

> [262] The scope of the duty to act bona fide in the best interests of the company is best propounded in the judgment of Kirby P in *Darvall v North Sydney Brick and Tile Co* (1989) 16 NSWLR 260 at pp 281–282, where His Lordship puts across in clear terms the exercise of the director's powers. His Lordship, inter alia, said that:
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> > ... In considering whether the actions of directors were bona fide in the best interests of the company as a whole, the court is not obliged to look at the company as in some way disembodied from its members. The phrase 'bona fide for the benefit of a company as a whole' is derived from Lord Lindley's comments in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at p 671. It tends, by overuse without fresh reflection to become a 'cant expression (see Brennan J in *New South Wales Rugby League Ltd v Wade*). In the present as in other contexts, the best interest certainly included the interest of the shareholders as the corporators with a direct state in take-over offer.
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> > Honest behaviour on the part of directors is expected. However, it is not in itself enough to sustain their conduct if their conducts is otherwise determined to have been carried out for an improper of collateral purpose: *Howard Smith Ltd v Ampol Petroleum*.
> >
> > Similarly, statements by directors about their subjective intentions, or beliefs, are not conclusive of their bona fides or for the purposes for which they acted as they did (*Advance Bank Australia Ltd v FAI Insurance Ltd* at p 485). Even though the motives for exercising a fiduciary power are substantially altruistic, if those altruistic motives were actuated by an ulterior or impermissible purpose or were carried out in an improper manner, they will be set aside. This is so in order to ensure the integrity of the actions of the fiduciary and to require that the fiduciary's decisions are made bona fide and for proper and relevant purposes.
> >
> > Nevertheless, although not conclusive, the court can look at the deterred intentions, of directors in order to test their assertions (which will often be self-protective) against the assessment by the court of what, objectively, was in the best interest of the company at the relevant time ...

[29] By their own admission, the first to fourth defendants represent shareholders who hold minority control but constitute the majority at the board of directors' level and who are opposed to the acceptance of the UMW offer. They call themselves the opponents' faction. The shareholders aligned to MARA and the eighth and ninth defendants who are in favour of the UMW offer are referred to by the first to seventh defendants as the proponents' faction. The proponents' faction hold majority control as shareholders but they are a minority on the board of directors.

[30] The UMW offer was made by letter dated 7 March 2018 and

considered for the first time at the board of directors meeting of Med-Bumikar on 8 March 2018.

[31] It is not disputed that on 12 March 2018, MARA issued the requisition notice to the board of directors of Med-Bumikar, which included notice of resolution 2, a resolution to appoint 2 additional directors to the board.

[32] MARA's requisition notice was rejected by the first to fourth defendants during the board of directors' meeting on 26 March 2018. The three other directors being MARA's representative, the eighth and ninth defendants voted to accept the requisition notice; being in the minority, they were defeated.

[33] The minutes of the board meeting on 26 March 2018 reveal that the first defendant as chairman of the meeting stated that the requisition notice was 'defective' as resolution 1 had to be passed by 'special resolution' whereas the requisition notice had referred to ordinary resolutions. He relied on article 75 of the AA which states:

> All business transacted at an annual general meeting, other than business which, under these articles ought to be transacted at an annual general meeting, and all business transacted at an extraordinary general meeting, shall be deemed special.

[34] However, there is a distinction between 'special business' and 'special resolution'.

[35] Reference can be made to the case of *Wong Pak Sum v Hong Kong Furniture & Decoration Trade Association Ltd* [2013] HKCU 2774 where the plaintiff argued that a resolution was 'special business' and therefore could only be passed by 'special resolution'. The court held:

> [8] In my view, the plaintiff has confused the concepts of special business and business requiring special resolution. They are not the same. He may have been misled by the word 'special' in the term 'special business' to this that such business is required to be approved by special resolution. There is, in my opinion, no such requirement in law or in the articles of the defendant.
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> ...
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> [10] Special business, on the other hand, is not a term defined by reference to the type of resolution required to transact it ... The significance attached to an item of business being special business is in the contents of the notice that has to be given to members ...
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> ...
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> [13] The fact that an item of business is special business therefore has implications on the requirements relating to notice and form of proxy as explained above. There is no further provision in the Companies Ordinance requiring special business to be

A transacted by special resolution of the company. Nor is there any stipulation to that effect in the model articles in Table A or Table C or in the articles of association of the defendant in this case.

B **[36]** The minutes of the board meeting on 26 March 2018 also reveal the first defendant expressing his view that it was 'unfair for 50% + 1 shareholders' to 'decide on the disposal of 95% of the assets of Med-Bumikar'. I agree with learned counsel for the eighth and ninth defendants that this is not a proper consideration for a director, whose concern should be what is permitted under the law.

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[37] MARA fulfilled the shareholding requirement under the AA and s 311 of the Companies Act 2016 (a shareholder holding at least 10% of the shareholding) to requisition for an EGM and yet its requisition notice was rejected. I find that the rejection of the requisition notice was a breach by the first to fourth defendants of their duties under the articles and s 311 of the Companies Act 2016 (see *Dato' Hamzah Abdul Majid & Anor (for and on behalf of shareholders and members of Wembley Industries Holdings Bhd other than the defendants) v Wembley Industries Holdings Bhd & Ors* [1998] 2 MLJ 211; [1998] 4 CLJ 471).

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[38] Having rejected MARA's requisition notice, the board then made it clear that the rejection of requisition notice did not stop MARA from convening an EGM. In other words, the first to fourth defendants knew it was likely that MARA would issue a notice for an EGM on its own, as it was entitled to do under the law. Specifically, s 313(1) of the Companies Act 2016 allowed MARA to do so.

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[39] The first to fourth defendants, having rejected MARA's requisition notice, and being aware that it was a matter of time before MARA convened an EGM through its own notice, caused the DCR to be passed. The first to fourth defendants signed the DCR on or before 9 April 2018 before the same was then sent to the eighth and ninth defendants and MARA.

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[40] Articles 103, 104 and 137 of the AA of Med-Bumikar provide as follows:

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(a) article 103 of AA:

> Until otherwise determined by general meeting the number of Directors including the Managing Director shall not be less than six (6) nor more than nine (9), but in the event of any casual vacancy occurring and reducing the number of Directors below the aforesaid minimum the continuing Director may act for the purpose of filing up such vacancy or vacancies or of

summoning a general meeting of the company.

(b) article 104 of AA:

> The Directors shall have power at any time and from time to time to appoint any other qualified person as Director, either to fill a casual vacancy or as an addition to the Board, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or pursuant to Article 103 but any Director so appointed shall hold office only until the next following annual general meeting of the company, and shall then be eligible for re-election.

(i) article 137 of AA:

> A resolution in writing signed by a majority of the directors for the time being present in Malaysia, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. Any such resolution may consist of several documents in like form including facsimile, each signed by one or more directors.

[41] As at 8 April 2018, Med-Bumikar's board of directors comprised seven directors. Under article 103, there were two seats available on the board of directors. MARA had, through its requisition notice, evinced a clear intention to call for an EGM to enable the shareholders to vote on resolution 1 on the UMW offer and resolution 2 for the appointment of two directors.

[42] It is obvious that the real or predominant reason the first to fourth defendants appointed the fifth and sixth defendants as additional directors was to prevent MARA from appointing two additional directors at the EGM. The first to fourth defendants had not shown why there was a need to appoint two additional directors at that juncture and why the appointment could not have been tabled at a physical directors' meeting. It was obviously done by way of DCR in order to get around the requirement for a representative of MARA to be present to constitute a quorum at a directors' meeting.

[43] The Hong Kong case of *Tsang Wai Lun Wayland & Anor v Chu King Fai & Ors* [2009] HKCU 1195 is instructive. In that case, the board of directors refused to convene a special general meeting (equivalent to our EGM) pursuant to a shareholder's requisition notice. The shareholder had sought the convening of a meeting to appoint nine directors. Instead, the board of directors proceeded to appoint five directors under the powers granted pursuant to article 115 of the company's bye-laws. The court held that while the bye-laws conferred power on the directors to appoint additional directors (as it also did in our case here), this power could not be used to defeat the right of shareholders. It can be seen that the facts of this case are very similar to the facts

of the present case. The court stated:

> [61] But suppose that the power under Art 115 is exercised for the exclusive or predominant purpose of preventing Grand Field's shareholders in General Meeting from exercising their right to appoint additional directors under Art 114. It seems to me that such exercise of the power under Art 115 would constitute a unilateral interference with a constitutional right given by the Bye-Laws to Grand Field's shareholders. Such interference would therefore be impermissible. The power under Art 115 is being exercised solely or primarily to keep out such additional directors as the General Meeting (in the exercise of its rights) may appoint. That would be contrary to the covenant in Art 114 of the Bye-Laws.
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> [62] In *Piercy v Mills* [1920] 1 Ch 77, Peterson J stated (at 85-5):
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> > Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, open to the directors, for the purpose of converting a minority into a majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action.
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> [63] Piercy concerned an issue of shares which was solely or predominantly motivated by a board's desire to prevent a majority shareholder plaintiff from nominating himself and his brothers as directors. The board sought to shut out the plaintiff by using the board's power to issue shares in such a way as to dilute the plaintiff's majority shareholding. Peterson J held that was an abuse of the power entrusted to the board. The power to issue shares was to be used when the company needed additional capital. The company not requiring more capital, it was wrong to issue shares merely to entrench the board's control of the company. Such wrongful issue was a breach of the majority shareholder's right under the company articles to push through a resolution for the appointment of certain persons as directors in the course of an annual general meeting.
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> [64] The present situation is analogous.
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> [65] Of course, the Board could appoint additional directors to strengthen its expertise. But where the Board's predominant purpose was to keep out the appointment by an SGN of additional directors and thereby to entrench control of management by the Boards and the 5 Directors, the Board was acting in contravention of the contract contained in the Bye-Laws. The Board was attempting to stop Grand Field's shareholders from expressing their views in accordance with the Bye-Laws as to who should be on the Board.
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> ...
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> [76] Art 130 of Grand Field's Bye-Laws vests the function of management on the

board of directors as opposed to the general meeting. The majority of shareholders accordingly cannot control the directors in the proper exercise of such function.

[77] Conversely, the directors cannot seek to use their powers to obstruct the proper exercise by shareholders in general meeting of a right vested in them by the company's articles. In such case, the directors would be straying outside of the management function which is properly theirs and trespassing onto the constitutional rights of the shareholders in general meeting.

[78] Art 114 confer on shareholders a constitutional right to appoint additional directors by a majority in general meeting. It could not be a proper use of the directors' powers under Art 115 to attempt to prevent shareholders from exercising such constitutional right. Such would be the directors 'interfere[ing] with that element of the company's constitution which is separate from and set against their powers'. Such could not be within the permissible range of uses of the power under Art 115. On the contrary, such would be an abuse of the power under Art 115 which was presumably conferred to enable a board to enhance the range of ability, competence or expertise available to it for the better execution of the management function vested by Art 130.

[44] There was previously a proposal made in late 2017 to appoint a single additional director (the fifth defendant) but in any event, the credentials of the proposed director were never presented and it appeared that the appointment was in relation to the granting of share options to the first defendant and one Poh Chee Kwan which will dilute the shareholdings of the other shareholders. That board meeting scheduled for 11 January 2018 was postponed due to 'unforeseen circumstances' and the issue was never raised again until the DCR appointing the fifth and sixth defendants as additional directors.

[45] The reasons given by the first to fourth defendants for the appointment of the fifth and sixth defendants as additional directors are as follows:

(a) in late December 2017, an intention was already formed to appoint the fifth defendant to the board and but for the aborted meeting on 11 January 2018, the fifth defendant would have been appointed;

(b) the intention to appoint the fifth defendant was on the basis he was a former director general of MARA, a former chairman of Med-Bumikar and MBMR and currently a consultant to the latter;

(c) the intention to appoint the sixth defendant was premised on his directorship in Rubberex Corp (M) Bhd, a public listed company in which Med-Bumikar holds 21% in equity. The sixth defendant has consistently discharged its duties as a director with impartiality and in the best interest of Rubberex; and

(d) the fifth and sixth defendants are not shareholders of Med-Bumikar and they hold impeccable credentials and records in their professional careers.

A Their vast experience in the corporate sectors would be an added advantage to the board in the discharge of its duties.

[46] However I do not give any weight to the reasons stated by the first to fourth defendants. The timing of the appointment of the fifth and sixth defendants, in light of the proposed resolution by MARA to appoint two additional directors at the EGM are determinative of the real intention behind the appointing of the fifth and sixth defendants. It is to scuttle the attempt by MARA as a shareholder to appoint two directors of the company, to prevent MARA from exercising its right as a shareholder to appoint directors to the board of the company.

[47] Learned counsel for the first to seventh defendants failed to convincingly distinguish the *Tsang Wai Lun* case. He submitted that that case was decided on the basis that the shareholders were entitled or empowered to appoint directors whereas in the present case, the shareholders were not entitled in law to appoint directors at general meeting. I cannot agree with such submission. In the case of *Worcester Corsetry, Limited v Witting* [1936] Ch 640, in respect of a company with articles of association which are in pari material with the AA of Med-Bumikar, the court held that the power of appointing additional directors had not been delegated to the directors so as to exclude the inherent power of the company in general meeting to appoint directors. Furthermore, s 202(2) of the Companies Act 2016 provides that all subsequent directors (subsequent to the person named as director in an application for incorporation of a company) may be appointed by ordinary resolution. Learned counsel for the first to seventh defendants submitted that this power to appoint directors can only be exercised in an annual general meeting but not in an EGM. I do not agree. There is nothing stated in s 202(2) of the Companies Act 2016 to limit the appointment of directors by the general meeting by ordinary resolution.

[48] In the Singapore High Court case of *Lim Koei Ing v Pan Asia Shipyard & Engineering Co Pte Ltd* [1995] 1 SLR 499 at p 512; [1995] 1 SLR (R) 15, it was held that as the board of directors failed to provide any credible explanation for the appointment of additional directors, the appointment was not in the best interests of the company. The court stated, at p 29 that:

> Be that as it may, the effect after the appointment of the four new directors was that the board of the defendants did not fairly reflect the shareholders' interests in the defendants. The minority shareholders in fact had seven directors on the board whereas the majority shareholders only had two. At the trial there was no credible explanation as to why the services of these new directors were required by the defendants at the particular point of time. Accordingly, I accepted the defendants' submission that the directors were not appointed in the best interests of the defendants.

[49] I accordingly am of the view that the directors of Med-Bumikar did not act in good faith and for a proper purpose in appointing D5 and D6 as additional directors of the company.

[50] I agree with the submission of learned counsel for the eighth and ninth defendants that the first defendant's averment that the DCR had been purportedly ratified at a purported board of directors' meeting on 25 April 2018 is ill-conceived. The purported board of directors' meeting on 25 April 2018 was not properly constituted as there was a lack of quorum due to the absence of MARA's representative director. Any resolutions purportedly passed during this improperly constituted meeting are invalid.

[51] Article 129 of the AA prescribes that: 'Unless otherwise determined, three directors shall form a quorum, if one of them is a MARA director'. Therefore, MARA's representative directors must be present to form a quorum for the board of directors' meeting. MARA's representative director, Datin Junaidah bt Abdul Majid, was not present at the purported board of directors' meeting on 25 April 2018 and had, on 24 April 2018, voiced her objections towards the convening of this purported board of directors' meeting. The eighth and ninth defendants also objected to this purported board of directors' meeting.

[52] I hold that the first defendant's contention that MARA's representative need not be present to form a quorum if there were more than three directors present is not a proper construction of article 129.

[53] In the High Court case of *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211, there was a provision which required the presence of directors of a specified group to form quorum. The High Court held that due to the absence of the director from the specified group at the meeting, there was no quorum and accordingly any resolutions purportedly passed at the meeting were invalid.

[54] In the circumstances, there was no valid ratification of the DCR. The fact that the first to fourth defendants had seen fit to convene a directors' meeting to ratify the DCR is the recognition on their part that the DCR is defective. Any such ratification would not, in any event, cure the lack of good faith and proper purpose on the part of the directors in appointing the fifth and sixth defendants.

[55] Since the appointment of the fifth and sixth defendants as additional directors had not been made in good faith and for proper purpose, the appointment is invalid. I would accordingly grant orders in terms of MARA's OS.

[56] As regards the counterclaim of the seventh defendant, insofar as the shareholders in the EGM had purported to bind the board of directors of the company to act in a particular manner, I am of the view that it is not open to the shareholders to do so. Pursuant to s 211 of the Companies Act 2016, it is provided as follows:

> Section 211 Functions of Board
>
> (1) The business and affairs of a company shall be managed by, or under the direction of the Board.
>
> (2) The Board has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the constitution of the company.

[57] Article 118 of the AA of Med-Bumikar provides that the management and control of the business and affairs of the company shall be vested in the directors.

[58] It is settled law that if powers of management are vested in the directors, only they alone can exercise these powers, which shareholders in general meeting cannot usurp.

[59] *Automatic Self-cleansing Filter Syndicate Company, Limited v Cuninghame* [1906] 2 Ch 34, was a case where the directors of a company acting on the powers of management delegated to them under the article of association of the company, refused to sell the assets of the company resolved upon by the company in general meeting, as it was in their opinion, no in the interest of the company to do so. In refusing a motion brought against the directors for their refusal to carry out the sale transaction, the English Court of Appeal, after, inter alia, alluding to article 96 of the article of association of the company (at p 35), had stated thus (at p 38):

> ... It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration, of course, requiring a special resolution.

[60] The above principle of law as expounded by these foreign courts, found acceptance by our apex court in the recent case of *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal*. After making reference to various English authorities and speaking for the Federal Court, His Lordship Azahar Mohamed FCJ had this to say at p 677:

> [110] The starting point is the important 1906 case of *Automatic Self-cleansing Filter Syndicate Company, Limited v Cuninghame* [1906] 2 Ch 34 (CA) where the English Court of Appeal made the statement of principle that made it clear that the division of powers between the board of directors and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that, where powers had been vested in the Board, the general meeting could not interfere with their exercise. The directors ceased to be mere agents of the company. In that case, directors of a company refused to carry out a sale agreement to sell the assets of the company resolved upon by the company in general meeting because in their opinion it was not in the best interests of the company. The directors relied for support of their decision on the articles of association, which delegated to them all powers of management. The members argued that the articles were subject to the general rule that agents must obey the directions of their principles.
>
> [111] The English Court of Appeal held that the resolution of the general meeting was a nullity and could be ignored; the articles constituted a contract between all the shareholders by which it was agreed that the directors alone should manage. It was further held that the shareholders could not compel the directors to sell the assets according to their wish:
>
> > The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit ... It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not be able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration of course, requiring a special resolution.

[61] However, MARA and the eighth and ninth defendants contend that the resolution 1 passed at the EGM was merely a recommendation to the board of directors by the shareholders. it is not meant to be binding on the board.

Section 195 of the Companies Act 2016 gives shareholders the right to pass a resolution making recommendations to the board on matters affecting the management of the company. Section 195 provides as follows:

> Section 195 Members' rights for management review
>
> (1) The chairperson of a meeting of members of a company shall allow a reasonable opportunity for members at the meeting to question, discuss, comment or make recommendation on the management of the company.
>
> (2) A meeting of members may pass a resolution under this section which makes recommendations to the Board on matters affecting the management of the company.
>
> (3) Any recommendation made under subsection (2) shall not be binding on the Board, unless the recommendation is in the best interest of the company, provided that —
>
> (a) the rights to make recommendations is provided for in the constitution; or
>
> (b) passed as a special resolution.

[62] In this case, since the right to make recommendations is not provided for in the AA and the resolution is not a special resolution, the recommendation of the shareholders will not be binding on the board but the board must still consider it and act in the best interest of the company.

[63] Since it is settled law that a director had to exercise his powers in good faith and in the best interest of the company, it is not correct to say (as sought in the counterclaim) that the directors have an unfettered discretion to reject the offer by UMWH. The board can only reject the offer if that course of action is in the best interest of the company. Accordingly, I am unable to grant an order in terms of prayer (i) of the counterclaim of the seventh defendant.

[64] Since I have held that the appointment of the fifth and sixth defendants was invalid, I am unable to grant an order in terms of the remaining prayers in the counterclaim. However, in order to make it clear that resolution 1 is only a recommendation to the board of directors and is not to compel the directors to act in a certain manner I make a declaration that resolution 1 is valid only insofar as it is a recommendation to the board and not a directive to the board. Otherwise, I dismiss the other prayers in the counterclaim. I order costs of RM20,000 to MARA payable by the first to sixth defendants jointly and severally and costs of RM10,000 each to the eighth defendant and the ninth defendant to be paid by Med-Bumikar. All costs are subject to allocator.

[65] I was concerned about contentions made by the first to seventh defendants to the effect that the acceptance of the UMW Offer will lead to

Med-Bumikar being in breach of various agreements and would not be in the best interest of the company. However, as there is no resolution or recommendation of any binding nature made to the board in relation to the UMW offer, I am of the view that such concerns do not impact on the relief to be granted by me. The board will have to deal with the UMW offer in the best interest of the company under law.

Originating summons allowed and counterclaim dismissed.

Reported by Ahmad Ismail Illman Mohd Razali